would meet with at least equally great objections. In the ordinary case, it would be difficult to determine whether the public interest is better subserved by adequate service of a few or by imperfect service of many consumers. Any rule allowing a natural gas company to prefer one consumer would also open the way to collusion with a favorite customer. It is probable, therefore, that courts will prefer the single, definite test of discrimination to any vague, illusory rule based upon a theoretical advantage to the public.

"NECESSITY" IN THE LAW OF NEGLIGENCE.—That necessity was a well recognized ground at common law for imposing, or relieving from, legal liability is undoubted.[1] An agency was frequently implied on this ground.[2] If self defense,[3] and in some instances, the defense of property,[4] necessitated killing the assailant, or trespasser, the act was not murder; and many trespasses, if impelled by necessity, could be justified.[5] In general, four kinds of necessity find recognition. First, strict necessity, involving the preservation of human life. Second, economic necessity involving property and business interests. Little recognized at common law, this type has grown in favor. Thus it has been included within the necessity justifying violation of Sunday laws,[6] and the retention of property under a contract has been declared not to waive known defects where rejection would have entailed great economic disadvantage.[7] A ship's captain may, without liability, if impelled by necessity, sacrifice his cargo in order to save property on board.[8] Third, necessity of obedience to command.[9] This, it is conceived, narrows down to a case of strict necessity, for the ultimate need of obedience rests ordinarily upon the preservation of life. Fourth, necessity resulting from impaired mental ability instanced by action under sudden peril,[10] and, in some jurisdictions, homicide under impulse uncontrollable by reason of diseased mind.[11]

The application of these principles to the law of negligence is obviously logical. In such cases, however, the courts proceed with caution and seem to recognize strict necessity only. The custodian of a person having an

[1]Cf. the maxims *"Necessitas non habet legem"; "Necessitas vincit legem"* Bouvier Law Dict. Rawles Ed. vol. II p. 364; Egbert *v.* McGuire (N. Y. 1900) 36 Misc. 245; *In re* Briggs (1904) 135 N. C. 118, 126.

[2]McReady *v.* Thorn (1873) 51 N. Y. 454; Ginn *v.* Roberts (1874) L. R. 9 C. P. 331; Pike *v.* Balch (1854) 38 Me. 302. Cf. Terre Haute Etc. Co. *v.* McMurray (1884) 98 Ind. 358; Sevier *v.* Birmingham etc. Co. (1890) 92 Ala. 258; Gwilliam *v.* Twist (1895) L. R. 2 Q. B. D. 84.

[3]Kennedy *v.* Comw. (Ky. 1878) 14 Bush 340; State *v.* Johnson (1876) 75 N. C. 174; Reg. *v.* Dudley (1884) L. R. 14 Q. B. D. 273, 285.

[4]Carroll *v.* State (1853) 23 Ala. 28.

[5]Ploof *v.* Putnam (1908) 81 Vt. 471; Rightmire *v.* Shepard (1891) 12 N. Y. Supp. 800. Cf. Cole *v.* Turner (1704) 6 Mod. 149.

[6]Flagg *v.* Millbury (Mass. 1849) 4 Cush. 243; Morris *v.* State (1869) 31 Ind. 189; Johnson *v.* The People (1891) 42 Ill. App. 594; State *v.* Wilkinson (1877) 59 Ind. 416; Edgerton *v.* State (1871) 67 Ind. 588; Comw. *v.* Knox (1809) 6 Mass. 76; *Contra,* Comw. *v.* Josselyn (1867) 97 Mass. 411; State *v.* Goff (1859) 20 Ark. 289.

[7]Charlie *v.* Pothoff (1903) 118 Wis. 258; Payne *v.* The Lumber Co. (1903) 110 La. 750; Levy *v.* Schwarz (1882) 34 La. Ann. 209; Munro *v.* Butt (1858) 8 El. & B. 738, 753; Fitzgerald *v.* La Port (1894) 64 Ark. 34; Franklin *v.* Schultz (1899) 23 Mont. 165.

[8]Columbia Ins. Co. *v.* Ashley (1839) 13 Pet. 341. See also for other examples of economic necessity Egbert *v.* McGuire, *supra;* People *v.* Siegel (N. Y. 1873) 40 How. Pr. 151.

[9]Thompson *v.* Herman (1879) 47 Wis. 602; Keating *v.* Pacific etc. Co. (1899) 21 Wash. 415.

[10]Coulter *v.* Amer. Etc. Co. (1874) 56 N. Y. 585; Joyce *v.* Boyce (1816) 1 Stark. 493.

[11]Parsons *v.* State (1887) 81 Ala. 577.

infectious disease may publicly expose his patient if the necessity be urgent.[12] Further, a vessel may deviate from its course to save life upon a vessel in distress without liability for the deviation, but not to save property only.[13] This restriction is proper, for manifestly there is little merit in the contention that an individual may consider his duty to the person or property of another diminished because of his own or a third person's pecuniary interest.[14] Such an argument loses force, however, if the negligence sought to be excused is contributory and the necessity relied on results from the negligence of the adverse party.

Of course, if the negligence of one person puts another in a position of danger the adoption of a dangerous alternative is excusable.[10] Nor is a third person negligent who seeks to save another in peril.[15] However, if such negligence results merely in a high degree of inconvenience, the courts regard consequent action as impelled by necessity, so long as it is not obviously dangerous.[14] Further, riding upon the platform of an overcrowded car is not contributory negligence;[15] an obstructed side walk or road warrants deviation;[16] and an icy way may be used if the only one available.[17] In such cases the impelling necessity can scarcely be termed strict. If the necessity would induce similar conduct in an ordinarily prudent man it is sufficient. The necessity of saving property, however, is not deemed sufficient to warrant imperilling life.[13] The question whether it would excuse exposing property seems never to have arisen.

Assumption of risk must be sharply distinguished, in this connection.[18] Although necessity negates voluntary assumption of risk,[19] economic necessity, such as fear of losing a position, is here little countenanced. The distinction is not free from doubt.[20] Its disregard in a recent case is noteworthy. *Mo. Etc. Co.* v. *McLean* (Tex. 1909) 118 S. W. 161. A carrier supplied defective refrigerator cars to a shipper of fruit who, despite his knowledge of the defect, accepted them. Failure to ship at that time would have resulted in the total loss of the fruit. It was held that the necessity of the situation—a purely economic one—induced by the carrier, freed the shipper of blame. The decision is of little weight, however, because in pleading contributory negligence, the carrier admitted negligence on his own part, and as a carrier of goods is an insurer except for acts of God and of the public enemy, loss resulting from his negligence is actionable.[21]

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[12]Met. District *v.* Hill (1881) 6 App. Cases 193, 204; Rex *v.* Vantandillo (1815) 4 Maule & S. 73.

[13]Scaramanga *v.* Stamp (1880) L. R. 5 C. P. D. 295; 8 COLUMBIA LAW REVIEW p. 507.

[14]Western Etc. Co. *v.* Stanley (1883) 61 Md. 266; McDonald *v.* Chicago etc. Co. (1868) 26 Ia. 124; Adams *v.* Lancashire Etc. Co. (1869) L. R. 4 C. P. 739; Gee *v.* Met. etc. Co. (1873) L. R. 8 Q. B. 161.

[15]Turnbull *v.* Erickson (1899) 97 Fed. 891; Archer *v.* Fort Wayne etc. Co. (1891) 87 Mich. 101.

[16]O'Laughlin *v.* Dubuque (1876) 42 Ia. 539; Kelly *v.* Fond du Lac (1872) 31 Wis. 179.

[17]Cosner *v.* City etc. (1894) 90 Ia. 33; Mitchell *v.* City of Richmond (1907) 107 Va. 193.

[18]Davis Coal Co. *v.* Polland (1901) 158 Ind. 607.

[19]Cf. Fitzgerald *v.* Conn. Etc. Co. (1891) 155 Mass. 155.

[20]Thrussel *v.* Handyside (1888) L. R. 20 Q. B. D. 359; Yarmouth *v.* France (1877) L. R. 19 Q. B. D. 647.

[21]McCarthy *v.* Louisville Etc. Co. (1894) 102 Ala. 193.